IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.600 OF 2006.
ALONG WITH
CRIMINAL APPLICATION NO. 790 OF 2006.
IN
CRIMINAL APPEAL NO. 549 OF 2006.

Kersi Maneksha Shroff. ... Applicant.
Versus.
State of Maharashtra
Kandivali Police Station. ... Respondent.

Shri A.P.Mundargi i/by Shri J.G.Bhanushali for the Applicant.

Shri A.S.Shitole, A.P.P. for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 12th September, 2006.

P.C.:

1. I have heard the learned Senior Counsel appearing for the Applicant. Criminal Application no.600 of 2006 is for regular bail pending final disposal of the Appeal. Civil Application No.790 of 2006 is for extension of temporary bail granted in favour of the Applicant by order dated 7th July 2006 on medical ground. The conviction of the Applicant, who is the Appellant in the Appeal, is for an offence punishable under section 376 of the Indian Penal Code. He has been directed to suffer rigurous imprisonment for seven years. He is also directed to pay a fine of Rs.5000/-.

2. The learned Senior Counsel appearing for the the

Applicant has taken me through the notes of evidence and the Judgment of the trial Court. I have perused the record of the trial Court. The contention of the learned Senior Counsel for the Applicant is that there is gross and unexplained delay in filing the F.I.R. He submitted that this was a case of no evidence. He submitted that the report of the paternity test is in favour of the Applicant. He submitted that the offence alleged against the Applicant is for the period of October/November 1992. He submitted that the defence of the Applicant of complete denial is supported by the prosecution evidence. He pointed out that during the pendency of the trial, the Applicant was on bail. He submitted that considering the nature of offence and the findings recorded by the trial Court, a clear case is made out for grant of bail. The learned A.P.P. opposed the application for bail pointing out that at the time of commission of offence the age of the prosecutrix was less than 16 years. He submitted that the evidence of the prosecutrix clearly proves the commission of offence.

3. Since the offence alleged is under section 376 of the said Code relating to the prosecutrix who was allegedly below 16 years at the time of alleged offence, I have gone through the evidence and record of the proceedings. The case of the prosecutrix is that she was employed as a maid servant in the house of the

Applicant sometime in the year 1992. In the month of October 1992 the Applicant's wife who is a Doctor had gone to Hyderabad. According to the case of the prosecutrix, in October 1992 and in November 1992, the Applicant had forcible intercourse with her. According to the prosecutrix she became pregnant and she delivered a child on 30th July 1993. It must be noted here that even according to the case of the prosecutrix she was relieved from the employment in June 1993 i.e. one month before the delivery. The F.I.R. has been lodged on 8th August 1993. The child unfortunately died on 21st October 1993. The Applicant was arrested on 8th August 1993 and was enlarged on bail on 20th August 1993. The trial remained pending for a period of 13 years till 24th May 2006.

4. The prosecutrix as well as her father who deposed before the Court have admitted that very regularly the father used to meet the prosecutrix and very often the prosecutrix used to visit the house of her father in Mumbai. The prosecutrix admitted that there is a Police Station near the house of the Applicant and every day the prosecutrix was taking the child of the Applicant to the School. There are certain admissions given by the prosecutrix which are very relevant in the context of the defence of complete denial by the Applicant. As narrated earlier for the incident of October/November 1992, F.I.R. was lodged in

August 1993 after the delivery of the child. In the cross-examination the prosecutrix has stated thus:

> "Until I gave birth to the child I did not know that I was pregnant. Before the delivery I felt no signs of pregnancy."

In paragraph 19 of her cross examination, she has stated that 10 days after the incident she had gone to her house with her father and had stayed with the father for two nights and one day. She admitted that when she was taken by her father, the Applicant's wife was present in the house and the Applicant's wife used to treat her like her daughter. She admitted that she did disclose the incident even to her elder sister who was in Bombay at that time. She admitted that whenever she visited her father's house, girls of her age used to gather there.

5. It is pertinent to note that a Writ Petition was filed by the prosecutrix in this Court in the year 1993 containing various prayers including a prayer for transfer of investigation. In the said petition it is alleged that the Applicant gave some food to her after mixing some powder with it and after taking the said food she fell asleep. According to the case made out in the petition, the Applicant committed offence of rape by putting her under the influence of intoxication.

Another allegation in the petition was that the Applicant's wife was responsible for the death of the child. So far as the first allegation in the petition is concerned, the prosecutrix has denied correctness thereof in her cross-examination. The second allegation is not at all made by the prosecutrix in the present case.

6. The father of the prosecutrix was also examined before the Court. He stated that he was not aware about the pregnancy of his daughter till she delivered the child.

7. At the time of post-mortem of the child, the blood sample of the child was preserved which was sent for paternity test along with the blood samples of the Applicant and the prosecutrix to the Forensic Science Laboratory. The report of the analysis submitted by the Forensic Science Laboratory was placed before the Court along with the report of Dr.V.H.Kelvekar the Medical Officer in Police Hospital. The said Medical Officer was examined. The result of the paternity test is completely against the prosecution and it was opined that the Applicant cannot possibly be the father of the child in question. Dr.V.H.Kelvekar was examined as a witness. He deposed that the paternity test in the present case was also hundred percent reliable like DNA test.

8. It will be necessary to briefly refer to the findings recorded by the learned trial Judge. The learned trial Judge has held that the father of the victim being the widower having no other female member in the family, neither he nor his neighbours were aware of the victim's pregnancy. The learned trial Judge has held :

> "So also the victim being short in height she could hide pregnancy."

Referring to the inconsistent case made out in the writ petition, the learned trial Judge held thus:

> "However the victim had explained that she is illiterate girl. The fact that due to illiteracy the victim must have not understood the contents in the writ petition appears to be convincing."

Referring to the paternity test, the learned trial Judge has held thus:

> "Although the paternity test report reveals that the child, given birth by the victim was not belonging to the accused which is not a reliable document. However, the fact remains

> that the accused committed forcible sexual intercourse with the victim against her will on several occasions at his residence in the absence of his wife. As the victim was threatened by the accused, she did not disclose the incident to anybody."

In paragraph 76 of the judgment, the learned trial Judge has observed thus:

> "So also it supports the case of the victim that her pregnancy was not visible till she delivered the child. **After all the Court has to find out the probabilities in the case and not merely read between lines of the evidence."** (Emphasis supplied).

9. As stated earlier, the Applicant was enlarged on bail during the pendency of the trial on 20th August 1993. There is no allegation by the prosecution that he has misused the liberty granted to him. The judgment has been delivered nearly 13 years after the F.I.R. was filed. So far as the merits are concerned, I have already discussed the evidence and the impugned Judgment. This is a case where there is a gross delay in registration of the F.I.R.. There is delay in disposal of the trial also. Moreover for the entire period of trial spanning over nearly 13 years the

Applicant was on bail. The Applicant has been already enlarged on bail by this Court as he has been advised to undergo coronary by-pass surgery. Considering the large pendency of the Appeals in this Court, the present Appeal is not likely to be heard in near future. There are no criminal antecedents of the Applicant. Thus a case is made out for grant of bail.

10. Accordingly the Applications are disposed of by the following order:

i) Criminal Application No.600 of 2006 is allowed.

ii) The Applicant be enlarged on bail in the sum of Rs.25,000/- with one or two sureties in the like amount subject to condition that till disposal of the Appeal, the Applicant will attend the Kandivali Police Station at Mumbai on every first and third Saturday after he is discharged from the hospital.

iii) Criminal Application No.790 of 2006 does not survive and is accordingly disposed of.

Judge.